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INDESTRUCTIBLE TRUSTS AND PERPETUITIES IN NEW YORK

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THE PERPETUITIES PROBLEM IN NEW YORK

FOR over a century changes made by the Revised Statutes in the common law rule against perpetuities have been in effect in New York. Except for those changes, the common law rule with all its principles of operation and application has been consistently recognized and enforced. The principles of public policy which are the foundation of the common law rule are in equal degree the basis of the rule in New York. Except for the changes made in the period during which property may be taken out of commerce or its alienability may be interfered with by future contingent interests the rule is applied in New York substantially as at common law. In the application of the rule to class gifts, in the determination of what lives measure this period, the severability of valid limitations from those that are invalid, the effect which limitations made invalid by the rule have upon other gifts under the same instrument which standing by themselves would be valid, in short in all cases in which the rule is applied to future contingent estates, legal or equitable, the principles of the common law are for the most part consistently followed. Only such differences are apparent as arise between any two states in which the common law rule prevails, except for the changes made by the New York statutes in the permissible period, and except for the doubt which exists as to whether the principle of remoteness of vesting, where the absolute power of alienation is not suspended, applies under the New York statutes. The great bulk of the present law of perpetuities in New York is therefore common law.

The most important change made by the Revised Statutes in New York is found in the provisions, now included in Section 42 of the Real Property Law, which substitute "two lives in being" for "lives in being" and substitute the minority of a remainderman in fee in addition to two lives

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in being, in the place of a flat period of twenty-one years in addition to lives in being. An effort to amend Section 42 by restoring the period of the common law rule resulted in 1931 in the passing of a bill to that effect by both houses of the New York legislature which was vetoed by the Governor, who referred the entire matter to the Commission to Investigate Defects in the Law of Estates. After a public hearing, that body reported its findings to the legislature,¹ its conclusion being that "no change should be made in the present statutory rule against perpetuities in this state for the following reasons:

"(1) No demand has been disclosed by attorneys or by the public for any change.

"(2) The common law rule would produce more litigation. Lawyers would be required to learn and apply a new and radically changed rule.

"(3) The social and economic policy of the state justifies the retention of the present rule.

"(4) The common law rule would unduly extend the period of trusts.

"(5) The present rule permits the maker of a will to adequately provide for his widow and children or other objects of his bounty by trust or legal life estates and to guard against improvidence.

"(6) Should the present period of trusts be curtailed?

"(7) The rights of creditors of life tenants would be further affected by any unnecessary extension of the period of the trust."

The Commission did not pass on the many other changes in the New York statutes discussed and proposed at the hearing, limiting its action to the proposed change from the permissible period of two lives and a possible minority, to lives in being and twenty-one years. It is clear that the Commission was influenced principally by the feeling that the permissible period for the continuance of indestructible trusts should not be extended; on the contrary it considered it a serious question whether they should not be further curtailed. There can be no doubt that the regulation and restriction of these trusts is the most important problem in connection with perpetuities which presses for settlement in New York. The purpose of this article is to discuss indestructible trusts in their relation to the New York rule, after a brief statement of the more important inconsistencies and anomalies in the New York statutes on perpetuities which demand correction.

The Two Lives and Minority Period

At common law the period during which alienation might be interfered

1. FOURTH SUPP. REP., COMMISSION TO INVESTIGATE DEFECTS IN THE LAW OF ESTATES, LEG. DOC. NO. 55 (1933). (A Special Report on the Proposal to Change the Rule of New York State Regulating Perpetuities).

with by future contingent estates was the result of a compromise between a strict forbidding of any period whatever, and the giving effect to the more insistent public need and the natural desire of testators that they should have the power to provide for their families and other natural recipients of their bounty for a reasonable time, final distribution to be determined according to the will of the testator, provided the time therefor was not postponed for an unreasonably long period. The same public policy which demanded freedom of alienation required that testators should be permitted to tie up the property for a reasonable time in the exercise of this power to provide for their dependents and others. There is no doubt at all that the period of existing lives and twenty-one years developed as the limits of this reasonable time. Lives of persons in being was first held to be a reasonable period.² A few years later, a short flat period not measured by lives but well within the natural average life-time was held to be reasonable.³ Later it was held that a reasonable period would include any period of gestation of a child who was to take, the father having died before the child's birth.⁴ In 1736 the actual minority of a person taking an interest in the property in addition to existing lives was held to be an extension of the period which was in reasonable exercise of the testamentary power.⁵ As the result of a gradual development the flat term of twenty-one years in addition to lives in being was finally established as including all minorities that might be involved in any case, and also providing for a fixed reasonable period not measured by lives whether in addition to lives in being or where no such lives were involved.⁶ The fundamental question always was, what is the limit of a reasonable period during which testators shall be permitted to tie up their property in the exercise of their power of disposition?

No one has ever questioned the fact that the period of existing lives is the one natural period which automatically measures the time within which final distribution should take place. No one has ever given even a suggestion of a reason why two lives should be taken as measuring this period instead of three or five or any other number. It was a wholly arbitrary provision arrived at by the revisers by analogy to the

2. *Duke of Norfolk's Case*, 3 Ch. Cas. 1, *sub nom.* *Howard v. Norfolk*, 2 Ch. Rep. 229 (1682).

3. *Lloyd v. Carew*, Prec. Ch. 72 (1697) (12 months); *Marks v. Marks*, 10 Mod. 419 (1789) (three months after the death of a person in being); WALSH, *FUTURE ESTATES IN NEW YORK* (1931) 85.

4. *Gove v. Gove*, 2 P. Wms. 28, 64 (1722).

5. *Stephens v. Stephens*, Cas. t. T. 228 (1736).

6. Cases cited in note 3, *supra*. This was finally settled in *Cadell v. Palmer*, 1 Cl. & F. 372, 411 (1832).

period during which property could be tied up by entails in English family settlements,⁷ though estates tail had long since been abolished in New York and family settlements of the English type were quite impossible. In New York a testator with more than two children cannot hold his property together for their benefit until the death of the survivor, final division then to take place, without violating the two lives rule; but such a will is valid if only two children are involved.⁸ No reason has ever been given why a father with three or more children cannot provide for them in the same way as a father with two or one. In the past few years alone many perfectly proper and praiseworthy wills in no way involving any violation of public policy have been held void in whole or in part because three lives of beneficiaries were involved instead of two or one.⁹

Whether or not an extensive public demand exists for the change, a question answered in the negative in the Report of the Commission, is surely of little importance. Laymen know nothing about the question, and the average lawyer in New York whose practice does not lie in the field of the law of decedents' estates is very apt to have forgotten the little he learned in the law school of the subtleties and difficulties of the New York rule. The opinion of Chief Judge Pound, Professor Gray, the opinions, almost unanimous, of the professors teaching this subject in the leading law schools throughout the state, of the State Bar Association, real estate boards, title companies, life insurance companies as well as trust companies, indicate very clearly that informed and significant opinion is strongly in favor of the change.¹⁰ Whether we are driving legal or trust company business to neighboring states is relatively unimportant. The one important question is whether or not the two-lives rule is arbitrary and unreasonable, interfering unreasonably with testators in making dispositions of their property which are essentially reasonable and proper. Surely a law based solely on public policy cannot be defended if under its terms any will involving three or more beneficiaries

7. See Revisers' Note to 1 N. Y. REV. STAT. (1829) 723, §§ 14-21. See 2 POWELL, CASES ON TRUSTS AND ESTATES (1933) 193-194.

8. Professor Powell's Memorandum submitted to the Commission, FOURTH SUPP. REP., *supra* note 1, at 254-264, refers to many cases of this kind.

9. WALSH, *op. cit. supra* note 3, at 207-209, n. 134, containing an analysis of several such cases which had to be carried to the Court of Appeals in order to settle the question as between "two" and "three." On the two lives rule generally see also *id.* at 149-152.

10. For Judge Pound's and Professor Gray's views see quotations from their writings or addresses in memorandum by Professor Powell and Mr. Nordlinger, in behalf of the Committee on Law Reform of the Bar Association, New York City, FOURTH SUPP. REP., *supra* note 1, at 254. See memoranda of law school professors, *id.* at 203-210, 225-229, 254-264. See recital of the different bodies actively in favor of the change in (1931) 2 EDUC. L. CHRON, 61-64.

of trusts with gifts over to contingent remaindermen is very apt to require the expensive process of appeals to the Appellate Division and to the Court of Appeals in order to determine whether the gifts involved are valid or invalid. The memorandum of Professor Powell and Mr. Nordlinger¹¹ with its devastating and unanswerable criticism of the two-lives rule should alone have been conclusive. The many cases submitted in their report and in other memoranda and material submitted to the Commission¹² demonstrate conclusively that the two-lives provision has repeatedly and almost continuously operated to defeat perfectly reasonable and proper testamentary gifts. The cases that are appealed to the higher courts are only a small part of the actual mischief done by the rule. A far larger number of like cases are never appealed, and in countless other instances testators and their lawyers, no doubt, are prevented by this rule from making provisions in wills which should be allowed under any reasonable system of law.

The Report asserts that the restriction measured by the period of "lives" instead of two lives would greatly increase litigation, that lawyers would have to learn and apply a new and radically different rule, and that the social and economic policy of New York requires the rule as it is. But the cases referred to above fully establish that nearly all of the litigation reaching the Court of Appeals on this question turned on the "two-lives" limitation; if the rule was "lives in being," there would have been nothing to litigate in most of these cases. Lawyers could forget the most difficult and technical part of the law of perpetuities as they have learned it for New York practice. Surely the difference between two and more than two could be grasped at once by the most limited intelligence. As explained above¹³ this is a modification of only a single detail in the law; the great bulk of the law of perpetuities in New York is the common law. The "social and economic policy" of New York surely does not differ essentially from that of the other states, nearly all of which operate under the common law rule. In several of

11. See *FOURTH SUPP. REP.*, *supra* note 1, at 254-264.

12. See *id.* at 256 (Memorandum of Powell), giving as an example a will so essentially reasonable that it was administered for nine years without question, though eventually held void: *Matter of Grace*, 232 App. Div. 76, 248 N. Y. Supp. 543 (4th Dep't 1931); giving many illustrations of strained constructions arrived at in order to save reasonable and proper gifts from destruction by this rule (*id.* at 257-258); giving the problems of judicial surgery and of acceleration of valid gifts (*id.* at 259-260). The memorandum then refers to *WALSH*, *op. cit. supra* note 3, as asserting "that in very recent years,—1926-1928—the time and energies of the Court of Appeals and of the lower courts, and of the lawyers involved, were almost criminally wasted in carrying to Albany four cases in which the sole question involved was whether or not *three* lives, instead of *two*, were involved—and this after the statute had been in effect for about a century!"

13. See opening paragraph of this article.

the states which were misled into following New York in this change the common law period has been restored or extended;¹⁴ in others it has been largely restricted by the cases.¹⁵ The veriest tyro would hardly dignify such reasons as worthy of serious consideration.

It is said by Dean Alden in his report,¹⁶ and in the findings of the Commission¹⁷ that it is a simple matter under the existing law to make any reasonable provisions that may be desired for beneficiaries irrespective of their number. This conclusion is not in accord with the established facts as submitted to the Commission. Nearly every case of the many above referred to submitted by Professor Powell and Mr. Nordlinger and by others is an instance of a failure to accomplish an entirely reasonable scheme of distribution solely because more than two bene-

14. Wisconsin after adopting the New York scheme in 1849 restored the 21 year term in gross by Wis. Laws 1887, c. 551. After extending the statutory rule to personality for the first time in 1925, its operation was so unsatisfactory that the common law rule was restored by Wis. Laws 1927, c. 341, except that the term in gross was extended to 30 years. What was left of the New York scheme was eliminated by Wis. Laws 1931, c. 72. In Connecticut and Ohio statutory changes in the period not based on the New York rule were finally repealed and the common law rule restored. CONN. GEN. STAT. (1888) § 2952 limited all gifts of real property to persons in being or to their immediate issue or descendants. This was repealed, restoring the common law period, by Conn. Pub. Acts 1895, c. 249. A similar statute in Ohio, GEN. CODE (Page, 1926) § 8622 was repealed and the common law period was expressly restored as of Jan. 1, 1932 by OHIO GEN. CODE (Page, Supp. 1932) § 10512-8.

15. The New York rule, adopted by statute in Minnesota in 1851 [MINN. STAT. (Mason, 1927) §§ 8044-8046, 8090:6] applies only to real property. Little is left of the New York period as the result of Minn. Laws 1893, c. 83, § 1, allowing trusts for the common law period provided the trustee is given power to convey the trust res in changing investments not later than the two-lives period. In Michigan the New York period was adopted in 1846. The common law period applies, however, to gifts of personal property. As to realty, the New York rule is in effect discarded by the holding that if the period is measured by the life of the survivor of a group of persons, it is measured by one life. *Felt v. Methodist Educational Advance*, 247 Mich. 168, 225 N. W. 545 (1929). See POWELL, *op. cit. supra* note 7, at 195, n. 54, for reference to action by the Michigan State Bar Association recommending the restoration of the common law period in all cases.

For the best and latest brief summary of statutory changes in which the matters referred to in this and the preceding note are discussed, see *id.* at 192-197. Powell states that two-thirds of the states have in no way modified the common law period. Idaho, Indiana, Montana, North Dakota, Oklahoma and South Dakota, which have followed New York in eliminating the term in gross and in restricting the minority period of the earlier common law rule, failed to adopt the "two-lives" rule, so that multiple lives measure the period as at common law. In Arizona a minority or 21 years in gross is allowed. It has the two-lives rule, but restricted to realty. Arizona alone seems to have remained faithful to New York's two-lives rule, but even there this limitation is restricted to gifts of realty.

16. FOURTH SUPP. REP., *supra* note 1, at 52.

17. *Id.* at 11.

ficiaries were involved. In most of these cases the wills were prepared by lawyers of standing and experience who consciously attempted to avoid the pitfalls of the two-lives rule. In most of them there were great differences of view as between the surrogate, the judges of the Appellate Division and the judges of the Court of Appeals as to the validity or invalidity of the gifts in dispute. Professor Russell has pointed out that in seventeen of the thirty cases involving this question carried to the Court of Appeals between 1914 and 1930, in which the judges disagreed, assuming the majority of the Court of Appeals to be right and the rest wrong, only about sixty per cent of the judges of the higher courts decided the cases correctly.¹⁸ In a recent case¹⁹ decided by Surrogate Foley, the will of one of our ablest lawyers was held invalid because three lives instead of two were involved. The quotation from Gray's Perpetuities is reinforced by a similar statement by Chief Judge Pound of the Court of Appeals in the Powell-Nordlinger memorandum²⁰ that this rule makes the preparation of a will one of the most difficult and delicate tasks a lawyer is called upon to perform. As against all this the statement of the members of the Bar Association Committee referred to by Dean Alden²¹ and on which this finding of the Commission seems to be based is anything but convincing.

Taking up the minority period, the revisers failed to provide for the additional minority period involved in gifts to minors after lives in being to vest on their attaining twenty-one. They made provision for such a period only in the case of remaindermen in fee whose estates are to end if they should die before they attain that age.²² This was quite obviously

18. See POWELL, *op. cit. supra* note 7, at 401, quoting from *Recent Legislation* (1931) 2 FIDUC. L. CHRON. 100, FOURTH SUPP. REP., *supra* note 1, at 327.

19. Estate of DeForest, 147 Misc. 82, 263 N. Y. Supp. 135 (1933).

20. FOURTH SUPP. REP., *supra* note 1, at 254.

21. *Id.* at 42.

22. N. Y. REAL PROP. LAW (1909) § 42, after defining suspension of the absolute power of alienation provides that "every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age." It is clear that the minority period can apply only when a *remainder in fee* is given to the minor subject to be defeated if he should die before attaining 21. No extension beyond two lives is permitted in any other case, and not, therefore, in the cases at common law frequently arising of gifts to such of a class who live to attain twenty-one. In these cases the minors are treated as lives in being, only two of which are permitted under the rule. *Tayloe v. Gould*, 10 Barb. 388 (N. Y. 1851); *Seitz v. Faversham*, 205 N. Y. 197, 98 N. E. 385 (1912) *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. 933 (1889).

an oversight, as the same reasons exist for the extended period in one case as in the other. Actual minorities of this sort are preferable to the twenty-one year flat period of the common law, if indestructible trusts (hereafter discussed) are to be continued in New York. The flat term applies irrespective of lives in being, and permitting such trusts to continue for twenty-one years irrespective of or in addition to lives seems highly inexpedient. A simple provision covering actual minorities would serve every reasonable purpose if a short flat term be provided for where no lives measure the period. Most of those seeking a change in the rule in New York would have been satisfied with this without restoring the twenty-one year period. The Commission stressed the impolicy of extending the period of trusts for a flat term of twenty-one years, though memoranda submitted by some of those seeking a change in the law contained a proposed act which retained the minority provision of the earlier common law, eliminating the provision for a twenty-one year term in addition to lives in being.²³

Where no lives are involved which measure the period, expediency and common sense require that a short flat term should be permitted. If indestructible trusts are to be permitted to tie up the property whether they are genuinely spendthrift or not, the twenty-one year flat term is probably too long. As we have seen,²⁴ practically from the beginning of the common law rule the tying up of property for a short period not measured by lives in being, but well within the period of the average life, was held to be reasonable and therefore valid. In many cases in New York, gifts have been held void which interfered with alienation for a short period not measured by one or two lives.²⁵ Surely if testators

23. The proposed amendment of N. Y. REAL PROP. LAW (1909) § 42 appears in WALSH, *op. cit. supra* note 3, at 211. It would restore the common law period except for a provision that not more than two lives of strangers to the gift can be taken as measuring the period. After the hearing, in view of the fact that the New York system of indestructible trusts was to be continued, this suggested modification of Section 42 was modified in the memorandum submitted by the author of this article to read as follows (FOURTH SUPP. REP., *supra* note 1, at 212): "Every contingent future estate or interest shall be void in its creation which is not certain to vest in interest, if at all, within the lives of persons in being at the creation of the estate, and during or at the expiration of the actual minority of persons not so in being to whom remainders in fee are limited by the same deed, will or other instrument; or within the flat term of ten years if no lives are involved as measuring the period within which such vesting must take place . . ."

24. See cases cited in note 3, *supra*.

25. Some of these cases include *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938 (1889) (a trust for the benefit of the testator's widow and six children until the youngest child should attain 21 "or would have attained that age if living," which date would be reached in seven years, held void as a trust for a flat term not measured by two lives); *Hawley v. James*, 16 Wend. 61, 119 *et seq.* (1836); *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917 (1901) (for five years); *McGuire v. McGuire*, 80 App. Div. 63, 80 N. Y. Supp.

are to be given the power to tie up property for a reasonable time measured by a life or lives, they should have the power to prevent its alienation for a short period well below the average lifetime, such as ten years, when no lives are used as the measure of the period. Interference with testamentary power and purpose, however arbitrary as under the two-lives rule, should not also be merely silly, as in holding void gifts which result in suspensions for short periods such as a week, or a month, or five years.²⁶

Remoteness of Vesting in New York

Do the New York Statutes, as interpreted by the courts, establish the common law principle of remoteness of vesting? Section 42 of the Real Property Law sets up the requirement of two lives and a minority period as a limitation merely upon suspension of the absolute power of alienation. It says nothing whatsoever about remoteness of vesting. Section 46, however, provides: "A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof." And according to the last clause of Section 50, ". . . a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article." But although remoteness of vesting is thus limited in the case of a remainder created on a term of years and in the case of a fee upon a fee, no such statutory limitation is placed on the creating of future springing interests; for the first clause of Section 50, which deals with springing interests, provides merely that "a freehold estate . . . may be created to commence at a future day" without any provision that the contingency on which it is to arise must happen within the period of the rule. In the final clause of Section 50, quoted

497 (1st Dep't 1903) (for three years); *Hagemeyer v. Saulpaugh*, 97 App. Div. 535, 90 N. Y. Supp. 228 (1st Dep't 1904) (similar to *Haynes v. Sherman*, *supra*); *Matter of Berry*, 154 App. Div. 509, 139 N. Y. Supp. 186 (1st Dep't 1913) *aff'd* 209 N. Y. 540, 102 N. E. 1099 (five years). See many additional cases to same effect cited in *POWELL, op. cit. supra* note 7, at 384. See discussion of these cases, *id.* at 386, 387; also *WALSH, op. cit. supra* note 3, at 153, 166, 210.

26. That the 21 year period of the common law prevails in two-thirds of the states see note 14, *supra*. Idaho, Indiana, Montana, North Dakota and South Dakota followed the New York influence as did Oklahoma, but Oklahoma now permits trusts to run for 21 years in gross as an alternative to lives in being. OKLA. STAT. (1931) § 11821. California has a similar provision, but the term in gross alternative to lives in being is 25 years, introduced by CAL. STAT. (Amendments of 1917) c. 539. The period in gross was made 30 years in Wisconsin in 1931. See note 14, *supra*. The period in gross, therefore, prevails in nearly all the states.

above, permitting a fee upon a fee, it is expressly provided that the contingency must happen within that period. Surely this must mean that no such restriction is placed on the creating of springing interests provided for in the first clause of Section 50.

Nevertheless, in *Walker v. Marcellus Railroad Co.*,²⁷ the New York Court of Appeals held a future springing interest void under Section 50 because it did not vest within the two-lives and minority period, and this although the interest in question did not suspend the absolute power of alienation. The decision was made upon the authority of *Matter of Wilcox*;²⁸ but although that case contains dicta based upon statements in Professor Chaplin's book that all future interests must vest within the required limits in New York whether the absolute power of alienation is suspended or not, it holds merely that a fee upon a fee, though the second fee is limited to an existing person who may convey it so that the absolute power of alienation is not suspended, is nevertheless void unless it is bound to vest within the required period. The Court explained its decision in the *Walker* case by saying that a springing interest is in effect a fee upon a fee as in the *Wilcox* case, which is technically not true. The other reason given, the only possible one which could be used to support the result reached in the *Walker* case, is that in Section 50 in the case of a fee upon a fee, and in Section 46 in the case of a contingent remainder after a term of years, the rule against remoteness of vesting is adopted and applied by the Revised Statutes, that the mischief is exactly the same in the case of future springing interests and contingent remainders after life estates, and that therefore the court is justified in extending the *principle* of remoteness of vesting to these other cases. This, of course, would be judicial legislation, not based on the statutes as adopted, since the clear inference is that the revisers intended this principle to be applied only in the two cases expressly covered; but it would surely be well within the power of the court acting in the exercise of its function to coordinate and develop the law.²⁹

This principle of remoteness of vesting in cases not falling within Section 46 or within the last clause of Section 50 as above explained is left exceedingly uncertain by decisions definitely holding that springing interests to ascertained persons which might not vest within the required period, and which would be void under the doctrine of the *Wilcox* and *Walker* cases, were valid solely because they did not suspend the power of alienation. In *Sawyer v. Cubby*³⁰ a bequest to Cubby for an amount

27. 226 N. Y. 347, 123 N. E. 736 (1919).

28. 194 N. Y. 288, 87 N. E. 497 (1909).

29. As sustaining this doctrine see Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383; Note (1917) 30 HARV. L. REV. 742; WALSH, *EQUITY* (1930) 61, 62, 570.

30. 146 N. Y. 192, 40 N. E. 869 (1895).

contingent on an event to be determined one year after the testator's death, and in no way measured by a life in being, was held to be valid because Cubby was in existence and could transfer his contingent interest during the year. In *Epstein v. Werbelovsky*,³¹ an option to an ascertained person, which clearly creates a future contingent equitable interest subject to the condition precedent that the option be exercised, was held to be valid because it could be conveyed and therefore did not suspend the absolute power of alienation. Surely options interfere with alienability exactly as does a fee upon a fee or a future springing interest such as those involved in the *Wilcox* and *Walker* cases. A revision of Section 42 which would leave this question in the air would be quite without excuse or reason. This was the most serious defect in the legislation heretofore discussed vetoed by Governor Roosevelt.

Successive Vested Life Estates in New York

The number "two" appears to have had a peculiar fascination for the New York revisers. Not content with making void all gifts which might suspend the absolute power of alienation for more than two lives in being, they framed Section 43 of the Real Property Law so as to remove all validity from successive life estates in excess of two when followed by a remainder in fee. No one has ever been able to suggest a coherent reason for this strange provision. These life estates do not suspend the absolute power of alienation when limited to persons in existence; moreover, since they are always vested in such cases, the rule against undue remoteness of vesting has no application. We may speculate that the revisers confused vesting in interest with vesting in possession when they were moved to make this provision. Their most valiant defenders admit that the provision has no connection with the rule against perpetuities in New York.³² This section has received very little attention in the cases.³³ Its power to cause serious mischief is indicated by the possibility of applying it to estates of trustees.³⁴ It should be repealed as an arbitrary interference with the power to make gifts which in no way violate the public interest.

31. 193 App. Div. 428, 184 N. Y. Supp. 330 (2d Dep't 1920) *aff'd* 233 N. Y. 525, 135 N. E. 902 (1922).

32. "The amended statutory rule against perpetuities has no necessary connection with this section." FOWLER, REAL PROPERTY LAW (3d ed. 1909) 322. The only reference to this section in the reviser's notes (quoted in WALSH, *op. cit. supra* note 3, at 197, n. 116) throws no light on their purpose.

33. See *Purdy v. Hayt*, 92 N. Y. 446 (1883) holding that the remainder in fee will not be accelerated after the expiration of the first two life estates if it is contingent, at least until it becomes vested. See also FOWLER, *op. cit. supra* note 32, at 318, n. 34; 319, n. 41, 42.

34. *Id.* at 320, 321, 324, 325.

Sections 44 and 45 permit only one estate pur autre vie prior to the remainder in fee, and limit the duration of such an estate to two lives. Section 47 provides that "no estate for life shall be limited as a remainder on a term of years except to a person in being at the creation of such estate." All of these sections are as completely devoid of meaning or purpose as Section 43. The rule against perpetuities as contained in the other sections fully protects the public interest in all of these cases. All who discussed them on the hearing or in the memoranda submitted to the Commission were in favor of their repeal. There seem to be no cases applying or discussing the three sections last referred to and the revisers' notes fail to mention them. The fair assumption is that the Commission did not refer to them one way or the other because it limited its action to the change in the perpetuities rule involved in the legislation vetoed by the Governor which led to the submission of the question to the Commission. That all these sections should be repealed as obnoxious and possibly dangerous interferences with testamentary power is hardly open to argument.

INDESTRUCTIBLE TRUSTS

The Problem Outside of New York

It seems to be clear that the decisive consideration which induced the Commission to reject any change in the New York statutory two lives and minority rule was the feeling that the period during which indestructible trusts are permitted to tie up property so that its enjoyment may be separated from the usual incidents of ownership, liability for debts and the chances of gain or loss in the use of the property for business or investments, should not be extended. The minority period under Section 42 of the Real Property Law does not apply to such trusts for the reason that Section 96 subdivision 3 permits their creation only for the *life* of the beneficiary or for a shorter term, and the minority provision of Section 42 applies only to the minority of a remainderman *in fee*, and such a remainder in fee cannot be created in the form of a trust. It follows that the proposed change would have added the flat term of twenty-one years to the period, in addition to such incidental and probably negligible extension resulting from multiple lives instead of two lives.³⁵ This problem of indestructible trusts is the one important

35. See FOURTH SUPP. REP., *supra* note 1, at 15-17 (Summary and Recommendations). "(4) The common law rule would unduly extend the period of trusts . . . (6) Should the present period of trusts be curtailed? . . . It is contended that the prevailing tendency among testators who have been able to amass substantial wealth to limit their children to the income only and to make the third generation the real beneficiaries is unworthy and unwarranted. It is asserted that such desire on their part is predicated upon a degree of personal egotism in their own foresight, coupled with an unnatural distrust of the

objection to the proposed change in the New York rule. It is imperative that the period which measures the duration of such trusts be *the same as* that which measures the period within which future interests must vest, because the modern practice when postponing final distribution is to provide for the immediate beneficiaries, not in the form of legal life estates, but in the form of trusts, the final vesting to take place when such trusts come to an end. The absolute suspension of the alienation of legal estates, and the exemption of such estates from liability for the payment of debts, are everywhere void whether attempted by express affirmative provision or by condition. No difficulty is found in defeating the expressed intent of grantors or testators by holding such provisions void as contrary to public policy, no matter how short the period may be during which the provision is to operate. Yet the one reason given to sustain exactly similar provisions when applied to trusts, violating the public interest in exactly the same way, is that the intent of the testator or grantor must be given effect! Man as a reasoning creature is a good deal of a contradiction. A brief account of how the present situation of the law developed outside of New York is essential to an understanding of the problem in that state.

We should start with the proposition everywhere recognized that under the common law, from the time of Littleton or earlier, any condition or express provision limiting the right of alienation of legal estates for life or in fee was void, and that liability for debts has always been an inseparable incident of all legal estates in land or chattels.³⁶ It is equally

ability of their children to properly conserve their property interests. The point is also made that this tendency is intensified by the advertising propaganda of trust companies seeking more trust estates to administer by suggesting a practical certainty of loss of the accumulated wealth, unless it is tied up by means of an indestructible trust. It is further argued and appears to be a sound assertion that this tendency necessarily makes toward a suppression of individualism and self-reliance in the children . . . Instead of continuing our present rule it has been proposed that no suspension of the power of alienation [viz. by indestructible trusts] be permitted to extend beyond the minority of the children and the term of nine years thereafter, thus enabling the children to obtain their beneficial interests absolutely at no later age than thirty years." The Report makes clear (p. 17) that no objection is made to genuine spendthrift trusts for persons who are incompetent and who actually need protection from their own improvidence.

36. Conditions against alienation were apparently given effect in Bracton's time, but were void as repugnant to the estate created by the time of Littleton. 1 BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS*, f. 46, 46b; LITT. §§ 360, 361; 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (1895) 25-26. Coke said: "For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien." CO. LITT. 223a. He further states that the same rule applies to like conditions attached to transfers of lesser interests and of chattels.

That a donee's or grantee's power to alienate his estate, and its liability to be applied to

free from doubt that everywhere in the United States the same law is definitely established.³⁷ As a matter of reason and common sense the same law should apply to trust estates for life. In a leading case³⁸ the court said:

"If liability for debts is an inseparable incident of a legal life estate, as it unquestionably is, why should it not be an inseparable incident of a like estate in equity? One reason why it is an inseparable incident of property at common law is that it is against public policy that a man 'should have an estate to live on, but not an estate to pay debts with.' Does not this reason apply as much to equitable estates as to legal? A restraint on alienation and freedom from liability for debt are as much against public policy in the one case as in the other."

In England it has always been and still is settled law that provisions against alienation, and freeing property from liability for the debts of the owner, are void in the creating of trusts as in the creating of legal estates, and for exactly the same reasons.³⁹ Trusts for married women in England were developed in chancery in order to give relief from the strict rules at law giving to the husband the income from his wife's real property, ownership of her chattels, and the right to reduce to possession

the payment of his debts, are inseparable incidents of ownership which cannot be divested has been established law since a very early period. See *Brandon v. Robinson*, 18 Ves. 429 (1811); GRAY, *RESTRAINTS ON ALIENATION OF PROPERTY* (2d ed. 1895) §§ 105, 134; Co. Litt. 223a. That this law applies to life estates, legal or equitable, as well as to estates in fee, see also *Graves v. Dolphin*, 1 Sim. 66 (1826); *Rochford v. Hackman*, 9 Hare 475 (1852).

37. See GRAY, *op. cit. supra* note 36, §§ 134, 138, asserting that there is no authority on either side of the Atlantic that a life tenant of the legal estate in land can be restrained from alienation. See cases therein cited; also *McCleary v. Ellis*, 54 Iowa 311, 6 N. W. 571 (1880); *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376 (1889); *Hahn v. Hutchinson*, 159 Pa. 133, 28 Atl. 167 (1893); *Ehrisman v. Sener*, 162 Pa. 577, 29 Atl. 719 (1894); *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655 (1902); *Kerns v. Carr*, 82 W. Va. 78, 95 S. E. 606 (1918) (holding that provisions that a legal life estate be exempt from application to debts are void).

38. *Hutchinson v. Maxwell*, *supra* note 37, at 177.

39. GRAY, *op. cit. supra* note 36, § 256. In *Hutchinson v. Maxwell*, *supra* note 37, at 178, the court also said: "They [the English chancery courts] did not ingraft any new doctrine on the common law, as it suggested in some of the cases which uphold spendthrift trusts; but, as Professor Gray shows conclusively, 'they walked scrupulously in the ancient ways of the law; and it is these late cases which have departed from the principles of the common law as much as they have from the precedents in equity.' 'The common law,' as he says, 'held that legal estates of freehold, whether in fee-simple or for life, should not be inalienable; and chancery held the same of equitable estates of freehold' . . . Section 256."

See also English cases cited *supra* note 36. Professor Gray said, *op. cit. supra* note 36, at 151: "Whatever a man can demand from his trustees, that his creditors can demand from him," was the established English rule.

and realize on her choses in action and chattels real.⁴⁰ The effective accomplishment of this purpose required a modification of the common law as to alienability and liability for debts, and equity made the exception, setting up what were in effect spendthrift trusts for the benefit of married women.⁴¹

This exception in favor of trusts for married women has been extended in the United States to trusts in favor of widows, children and any other recipients of the testator's property when by express provision or by reasonable implication there appears an intent on the part of the testator that the beneficiary shall not have the power to anticipate his interest by mortgaging or selling it, and that it shall not be subject to the payment of his debts.⁴² The practical purpose back of this modification of the common law rule is to protect widows, children, aged parents and other beneficiaries who need protection against their own improvidence; the general public interest which demands that property

40. 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 310-315, tracing the history of this development.

41. See *Tullett v. Armstrong*, 4 Mylne & Cr. 377, 405 (1840) the court saying: "When this court first established the separate estate, it violated the laws of property as between husband and wife, but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the law of property, supported the validity of the prohibition against alienation." *Buckton v. Hay*, 11 Ch. Div. 645 (1879).

42. In *Jones v. Harrison*, 7 F. (2d) 461, 463 (C. C. A. 8th, 1925) *cert. den.* 270 U. S. 652 (1925), this development is summarized, after pointing out that the doctrine was definitely rejected in England in *Brandon v. Robinson*, *supra* note 36: "At a comparatively recent date American courts adopted a more liberal rule, enabling the testator to protect his gift until it is actually paid over to the beneficiary. The leading authority, *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, was decided in 1875. This was followed by the Supreme Judicial Court of Massachusetts in *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, in 1882, and by the Supreme Court of Missouri in 1888, in *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780. In this brief period since 1875 the rule has become firmly established in the great majority of American courts, and has been applied with increasing liberality of interpretation."

See Note (1931) 29 MICH. L. REV. 493, containing citations indicating that spendthrift trusts are valid in thirty-two states, and that only two states, Alabama and Rhode Island, have affirmatively declared them invalid. In Virginia their former invalidity (see *Hutchinson v. Maxwell*, *supra* note 37) has been substantially removed by a statute enacted in 1919, now VA. CODE ANN. (Michie, 1930) § 5157, which after providing that trust estates are liable for the payment of the debts of their owners, continues as follows: "but any such estate, not exceeding one hundred thousand dollars in actual value, may be holden or possessed in trust upon condition that the corpus thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them . . ." See also cases in notes following.

shall be generally subject to free alienation and to liability for debts gives way to the more insistent demand in the general public interest that donors be permitted to protect such persons against improvidence and waste, exactly as in the case of trusts for married women. This is expressed in a West Virginia case⁴³ as follows:

"Why should not a father having a dissolute, improvident or unfortunate son, be able to so bestow his own property as to protect that son from penury and want? Why should not a loving wife be allowed to so deposit her separate estate in the hands of a trustee as to keep her aged, unfortunate, dissolute or improvident husband from trudging his weary way over the hill to the poorhouse? Why should not any one be allowed to use his own property so as to keep the gaunt wolf of grinding poverty from the home door of those near and dear to his heart? It is only for a few years of a short life that he may do this; for he cannot extend it beyond the life estate. Whose property is this? Not that of the creditors of the son or of the husband. They have no right to that property. If they have lent credit in the life of the father or of the wife, they did it at their peril; for neither son nor husband had any interest in that property. If they extended credit after the creation of the trust, they did it with their eyes open to the trust and the character of the estate created by it. What have these creditors lost of which they can justly complain? . . . The contrary doctrine infringes upon the right of the owner of property to dispose of it as he prefers, and to devote it to highly commendable and meritorious uses. He ought to have the right to direct it to the reasonable provision of support and maintenance for those whom he leaves after he has gone."

Discounting the flamboyance in this quotation, it amounts only to the simple assertion that the ancient law, which has from early times refused to separate from property ownership the right to transfer it and its liability for the debts of its owner, should be modified so as to permit spendthrift trusts for the benefit of persons who need or may need protection from their own improvidence or lack of business experience. There will be little if any objection in the United States today to spendthrift trusts where some valid reason exists for giving this protection to the beneficiary. The difficulty is that this purpose is no longer essential to the validity of these trusts. It seems to be quite immaterial whether the beneficiary be a spendthrift son, an improvident husband in the shadow of the poor house, children over age or widows or aged parents without business experience, any of whom might well require such protection, or masters of business and of affairs such as Henry Ford or J. Pierpont Morgan. The trust is valid in every case, though it separates from ownership of the property such inseverable incidents as the power

43. *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405 (1902) by Brannon, J.

to alienate and liability for the owner's debts. This result has been reached for the alleged reason that the owner may by creating a trust impose his will after his death on the ownership of his property simply because the property is his and he may do with it as he pleases,—that his intent as expressed must be carried out and enforced, though he take away from the ownership which he transfers to his successors incidents of ownership which have been held inseverable from ownership during nearly all the centuries of the law's history in the protection of the public interest.⁴⁴

The courts which have established this strange doctrine hold to the old rule in every case where a trust is not involved. Legal life estates cannot be made inalienable and free from liability for debts.⁴⁵ The courts find no difficulty in refusing to give effect to the donor's or testator's intent where legal estates are so created. The owner's right to do what he pleases with his own property is still defeated if he attempts to sever those essential incidents from legal ownership. But in regard to trusts where no true spendthrift motive is involved, we nowhere find any attempt to justify this departure from established law, except mere

44. Thus in *Jones v. Harrison*, *supra* note 42, at 463, the court said: "A trust subject to the restrictions above specified has for historic reasons obtained the name of a 'spendthrift trust.' That term, however, is purely descriptive. Whenever the intent of the testator to impose the restriction exists, it is the duty of courts to respect the limitations, regardless of the habits of the beneficiary. In short, to create a spendthrift trust, it is no longer necessary that the beneficiary be a spendthrift." In *Nichols v. Eaton*, 91 U. S. 716, 725, 727 (1875) the leading case introducing this law, the court said: "The doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court . . . Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives* without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee."

This quotation covers with many words the same idea: the intent of the dead testator must be carried out when expressed in a trust though public policy is violated by exempting ownership of property from liability for its owner's debts and by eliminating the incident of alienability, inseverable in legal estates irrespective of the donor's intent.

So in *Spann v. Carson*, 123 S. C. 371, 391, 116 S. E. 427, 434 (1923), the court said: "The property devised or donated belongs to the deviser or donor, it is his property, to dispose of as he pleases; he should be allowed, as an incident of that proprietary right, to control his bounty; the trust should be upheld, not because the law is concerned to keep the donee from wasting it, though it may be as much concerned about this as to protect the homestead of a debtor, but mainly because it is concerned in protecting the donee's right of property."

45. See notes 38, 39, *supra*, and text to which they refer.

assertions that the owner may do as he pleases with his own, that his intent must be given effect, assertions which serve only to establish conclusively the total failure to grasp the problem and the failure to explain why, by creating the interest in the form of a trust, ownership can be separated from essential incidents of ownership contrary to the public interest. To any student familiar with the merger of law and equity under modern codes, and the giving effect to legal and equitable interests as component parts of a merged system, this result and the reasoning by which it is reached are strange indeed.

The real difficulty in permitting true spendthrift trusts as exceptions to the general rule, through the operation of a public interest strong enough to overcome the public policy back of the law applying to legal interests, is the practical difficulty of establishing any workable test by which testators and donors may know in what situations they may create such trusts. Whether a wife or a son of mature age needs such protection or not may be very doubtful. No court seems to have considered this question. From the beginning made in the case of *Nichols v. Eaton* quoted above,⁴⁶ the courts have been diverted from any real consideration of true spendthrift trusts as an exception to the general rule, similar to the exception created for the benefit of married women, by giving heed to the utterly specious and obviously false argument that the donor may do with his own as he pleases, that his intent must be given effect, irrespective of the public interest. If they had really addressed themselves to the task of ascertaining what spendthrift trusts are truly spendthrift and deserving of recognition and enforcement, they might readily have arrived at a solution by leaving that matter primarily to the judgment of the testator or donor, subject to defeat if upon the facts the court or surrogate should find no reasonable basis or need for such a trust in order to protect the beneficiary from improvidence or loss from lack of business experience or prudence. True spendthrift trusts are needed and must in some way be given effect. Treating them as exceptions to the general rule made necessary by exceptional situations in special cases will not seriously affect social and economic conditions except for the better. But to make vested life interests inalienable and free from liability for the owners' debts in all cases at the election of the donor or testator, irrespective of any need in the beneficiaries for such protection, is so obviously contrary to the economic and social interests of the people and so dangerous to the beneficiaries themselves, and is based on such perverted legal reasoning, that it is very difficult to believe we shall continue to accept the prevailing law without substantial change.

46. *Supra* note 44.

In the first place, these trusts take property out of commerce by separating its ownership from active use by its owner in productive enterprise and trade. The argument that the trust fund is administered by the trust company and by loans or investments in stocks and bonds it is kept at work in gainful enterprise, and is always in a liquid state easily transferable from one investment to another, does not meet the issue. Individual initiative and enterprise in the owner is destroyed by the trust. He receives and spends his income as it is paid to him by the corporate trustee. Only as his money is loaned to the actual promoters of industry is it brought into gainful use in the development of trade and wealth.⁴⁷ It is true that in this respect the old fashioned legal life estate with remainders over has much the same effect, as the life tenant can use only the income, but such life estates are used only for the benefit of widows and others in the exceptional situations in which true spendthrift trusts should be allowed. Normally the father gives his property outright to his children, at least after they have attained a certain age. Permitting such trusts in all cases to be free from liability for debts and from risk of loss of principal in conjunction with adroit advertising by trust companies, has resulted in a tremendous increase in the number of these trusts.⁴⁸ Such a law is a constant invitation, or rather temptation, to the testator to continue his control over what was his property after he is in the grave, and when the property normally should belong absolutely to his children.⁴⁹

47. STIMSON, *MY UNITED STATES* (1931) 76, blames the spendthrift trust in Massachusetts for Boston's commercial decline: "Immense wealth had been accumulated in Boston in the first sixty years of the republic; instead of trusting thier sons and sending them out at their own risks with all their argosies upon life's seas (as they themselves had done), they distrusted their ability . . . and had them all trusteeed. No new enterprise could be undertaken by them, for . . . they had no capital to risk. Perforce they became coupon-cutters—parasites, not promoters of industry—with the natural result to their own characters."

48. See an open letter from Mr. Henry Wynans Jessup, a specialist in the laws of estates, published in the *New York Times*, Dec. 29, 1931, quoting from figures appearing in the Index of Dec. 1931 (published by the New York Trust Co.). Quoting from the *FOURTH SUPP. REPORT, op. cit. supra* note 1, at 10: "It appears therefrom that in 1923 banks and trust companies were named as executors and trustees in 5899 wills, while in 1930 they were so named in 48,812 wills. It further appears therein that the amount of life insurance payable to banks and trust companies for administration as trustees increased from \$264,500,000 in 1926 to over \$4,000,000,000 in 1930, an increase of 1500%. These figures apparently cover the entire country. Mr. Jessup states that the power held by those who administer such gigantic aggregates of the wealth of the community may affect the management and operation of the chief industries of the country." See also quotation from the same report, *supra* note 35, based in part, evidently, on Mr. Jessup's letter.

49. See quotation from STIMSON, *op. cit. supra* note 47. See also quotation from Summary and Conclusions of the Commission, *supra* note 35.

If this tendency of testators to trustee their property is to be so allowed and encouraged, it ought to be easy to visualize the results of its natural development. The wealth of the country will become more and more centralized in the hands of banks and trust companies as corporate trustees, with its management and control concentrated in the narrow group of executives who manage those institutions, thus establishing more definitely their control over credit and over productive industry generally. Trust beneficiaries, who should be the real owners of their testator's property, will be divorced from all control and reduced to mere periodical recipients of such income as may be directly earned, with nothing accruing to them from the many indirect profits and advantages that the control and manipulation of credit undoubtedly gives.⁵⁰

In the second place, these trusts when not limited to true spendthrift purposes are unfair to the beneficiaries and pernicious in the effects which may follow on their position and character. They destroy initiative. They take away from the beneficiary the responsibility which ownership of property ordinarily involves. The beneficiary of these trusts has an assured income. His children are assured of the principal on his death as the final distributees. He is relieved of the spur to personal endeavor which would otherwise exist in protecting and increasing his property for his own benefit and the benefit of his children. He becomes a kind of ticket-of-leave man living on his allowance. He is eliminated as head of the family during his generation. His father, speaking through the trust though he is dead, has usurped his natural right. His children succeed to his father's position with respect to the property which should have been his.⁵¹

50. There seems to be no evidence that the courts are alive to the dangers in this situation. The legalization of these trusts by judicial decision has practically swept the country. Warnings of the danger appear in Mr. Jessup's letters to the *New York Times*, *supra* note 48, in the Summary and Conclusions of the Commission, *supra* note 35, and in a thoughtful article by Mr. Lukens, *Trust Estates and Character* (1932) 18 A. B. A. J. 137. The more usual attitude is expressed in an article by Cleary, *Indestructible Testamentary Trusts* (1934) 43 YALE L. J. 393, the purpose of which is to examine ways and means by which such trusts may be made more indestructible by devices which will serve to prevent termination by combined action of the beneficiaries, but with no thought of the public interest and the effect thereon of trusts of this kind. His assumption that corporate trustees may be relied on not to consent to such termination because of the profit motive is illuminating.

51. Lukens, *supra* note 50, at 137-139. "The main reason now for the excessive use of trust provisions is distrust of the heirs . . . The intention usually is not to benefit the grandchildren at the expense of the children, but to protect the children from their anticipated folly . . . No one would seriously maintain that each successive generation was less capable of managing its own affairs than the preceding one . . . I believe that the chief reasons for this prevalent fear that the next generation cannot handle its inheritance are egotism on the part of testators, and trust company advertising . . .

In the third place, these trusts are unfair to creditors. In cases of true spendthrift trusts, statutes providing for payment of debts out of the surplus income in excess of a stated amount or in excess of the amount required for the beneficiary's support meet the situation.⁵² This moderate interference with creditors' rights is necessary for the protection of the beneficiaries of such trusts. But surely that is no reason why the normal man of full age and responsibility should be freed from having his income applicable to the payment of his creditors, and every reason why his beneficial interest under a trust should be subject to his debts. The usual argument that his creditors are bound to know that his trust interest cannot be reached by them and that therefore they cannot fairly complain,⁵³ is disingenuous to say the least. A man's credit among tradesmen is largely determined by his station in life and the style in which he lives. If he is rich in income, his style of living gives him a false credit. Creditors cannot be charged with knowledge of the character of his wealth. The general rule of the law that liability for debts is an inseparable incident of ownership is buttressed in sound reason and justice. There should be no need of statutes permitting creditors to reach a portion only of such a trust where no spendthrift element is involved.

There is an element of plausibility in the argument in support of these trusts that in England and the United States generally creditors are not hurt by making these trusts free from liability for debts since the same result could be accomplished by a provision that in case of bankruptcy of the donee, or on an attempt by creditors to reach the property by execution or otherwise, his estate shall cease or revert or shift to another person. One answer is that at least the debtor would cease to own the property when this provision should operate. He could not con-

The objectionable feature of this sort of advertising is its appeal to fear. It plays upon a man's natural tendency to distrust his children and insidiously persuades him that his fears are well founded. It does this by exaggerating the difficulties of handling money, and by making occasional 'horrible examples' appear as typical. The implied contention is that the ordinary person is incapable of handling his own affairs, and that an estate not left in trust is almost sure to be lost . . .

"There are definite advantages in controlling the principal . . . There is the possibility of business opportunities. The ability to contribute capital often determines who shall be partner and who shall be clerk . . . Then there are emergencies . . . What good is the money 'in the estate' if a life can be saved only by spending vastly beyond one's income for a time?"

52. For statutes providing for the application of the income from spendthrift trusts to the payment of creditors see Griswold, *Reaching the Interest of the Beneficiary of a Spendthrift Trust* (1929) 43 HARV. L. REV. 63. See also 2 POWELL, *op. cit. supra* note 7, at 851-872.

53. See arguments to this effect in *Spann v. Carson*, *supra* note 44, and *Guernsey v. Lazear*, *supra* note 43.

tinue to mislead other creditors as in the case of these trusts. Furthermore, one bad law is no excuse for another which is worse. It seems that this law as to cessor, reverter or limitation over on an attempt to apply the property to the payment of debts is too well settled to be disturbed except by statute.⁵⁴ A statute making void any such provision would be in accord with good policy and sound business ethics.

Trusts to Delay Payment of Principal

Very similar to the ordinary spendthrift trust considered above and hence largely to be governed by the same considerations of policy is the trust to delay payment of principal. The leading case upholding a trust of this type is *Clafin v. Clafin*.⁵⁵ The trust in that case called for payment of \$10,000 to the beneficiary at the age of twenty-one, \$10,000 at the age of twenty-five, and the balance of the gift at the age of thirty. This was sustained as are the trusts heretofore discussed and for the same reason: giving effect to the testator's intent; and the court refused to compel the trustee to pay over the principal to the beneficiary before attaining the ages as provided in the trust. In England the beneficiary as the sole owner of the fund can compel the trustee to transfer it to him after he attains twenty-one.⁵⁶ It is clear, of course, that the purpose of such trusts is to protect the beneficiary from his own improvidence by preventing the loss of the principal until the payments provided for are made. It has been pointed out that provisions of this sort do not actually prevent alienation—the property may be alienated subject to delayed payment, and it may be sold to pay debts on the same terms⁵⁷—and since the gift is vested, the rule against perpetuities is not involved. But as provisions of this kind interfere with alienation in fact, they cannot be permitted to continue indefinitely. Accordingly, a considerable body of authority has developed insisting that these trusts, as well as spendthrift trusts which suspend alienation completely, shall not be permitted to continue for a longer period than that within which future estates must

54. *Hartwell v. Mobile Towing & Wrecking Co.*, 212 Ala. 313, 102 So. 450 (1924); *Louisville v. Cooke*, 135 Ky. 261, 122 S. W. 144 (1909) (does not apply to taxes); *Broadway National Bank v. Adams*, 133 Mass. 170 (1882); *Morel v. Cornell*, 234 Mass. 563, 125 N. E. 575 (1920); *Guernsey v. Lazear*, *supra* note 43.

55. 149 Mass. 19, 20 N. E. 454 (1889).

56. *Saunders v. Vautier*, 4 Beav. 115 (1841); *Curtis v. Lukin*, 5 Beav. 147 (1842); *Wharton v. Masterman* [1895] A. C. 186.

57. See criticism of Gray's position sustaining the English cases in *De Ladson v. Crawford*, 93 Conn. 402, 106 Atl. 326 (1919), also *In re Yates Estate*, 170 Cal. 254, 149 Pac. 555 (1915). The Virginia cases are *contra*, in accord with the Virginia cases condemning spendthrift trusts. *Thom's Executor v. Thom*, 95 Va. 413, 28 S. E. 583 (1897); *Armistead's Executors v. Hartt*, 97 Va. 316, 33 S. E. 616 (1899).

vest under the rule against perpetuities. By this new rule the period of the common law rule is applied to the duration of these new trusts.⁵⁸

Gray sustains the English and American cases which hold trusts of the *Clafin* case type void because they seek to separate from ownership another inseverable incident: the right of enjoyment.⁵⁹ It is therefore no answer to his argument that alienation is not suspended in these cases.⁶⁰ Where the spendthrift element does not exist to justify it, there is no apparent reason why the testator should be permitted to delay possession and full enjoyment by the devisee to whom he has given the property absolutely. These cases turn on the same reasoning as the spendthrift cases; and where a situation does not exist to justify a spendthrift trust, they are clearly contrary to sound principle.⁶¹

Indestructible Trusts in New York

We have seen that the doctrine of indestructible spendthrift trusts has developed in the United States for the most part since 1875, and that the general acceptance of the doctrine throughout the country has been comparatively recent. But in New York the principle was created by the revisers as part of the Revised Statutes in 1830, establishing the doctrine in more extreme form than that established in the other states in recent times.

Section 96 of the New York Real Property Law, which was Section 55 of the Revised Statutes, authorizes the creation of four kinds of express trusts, only the third of which needs to be considered in this paper. The Section provides as follows: "An express trust may be created for

58. *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246 (1909); *Van Epps v. Arbuckle*, 332 Ill. 551, 164 N. E. 1 (1928); *Southard v. Southard*, 210 Mass. 347, 96 N. E. 941 (1911); *Winsor v. Mills*, 157 Mass. 362, 364, 32 N. E. 352, 353 (1892): "Where such restraint [on alienation] is held permissible for a limited time, it would be deemed unreasonable and contrary to the policy of the law, to allow it to continue beyond the period fixed by the rule against perpetuities." See also GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) §§ 121c-121i; KALES, *FUTURE INTERESTS* (1920) §§ 286-296.

Vested trusts which are not spendthrift trusts or of the *Clafin v. Clafin* type are valid outside of New York exactly as are legal estates, since no question of their vesting is involved. See cases cited above.

59. Gray, *op. cit. supra* note 36, §§ 124l-124p. See GRAY, *op. cit. supra* note 58, § 120 ("... such direction is void, in pursuance of the general doctrine that it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest").

60. See argument to that effect in *De Ladson v. Crawford*, *supra* note 57.

61. See Scott, *Control of Property by the Dead* (1917) 65 U. OF PA. L. REV. 632, 647, recognizing that the spendthrift purpose is clear in these cases, that the trust is sustained as giving effect to the testator's intent, and that the answer to this is that the intent of the testator should not be permitted to override public policy by separating from the absolute ownership any part of the full right of enjoyment.

one or more of the following purposes: . . . 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto."

Section 103 of the same statute, in dealing with the beneficiaries of such trusts "to receive rents and profits of real property and apply them to the use of any person," provides that the rights of such beneficiaries "cannot be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred."

The original provision in the Revised Statutes of what is now Section 96, subdivision 3, quoted above was as follows: "3. To receive the rents and profits of land, and to apply them to the education and support, or either, of any person, during the life of such person," and so forth.⁶² In their notes referring to this section the revisers make clear that they intended to provide by it for trusts of the usual spendthrift type, and therefore intended to make inalienable by what is now Section 103 only trusts of that description.⁶³ A few months after the Revised Statutes went into effect Section 55 was amended by Chapter 320 of the Laws of 1830 so as to read "and apply them to the use of any person for the life of such person" and so forth, which has continued to be the law ever since. There seems to be no evidence of what brought about this change so soon after the adopting of the original provision which went into effect January 1, 1830. In this casual way, without any consideration of the effect of this change on the operation of what is now Section 103, so far as the record shows, all express trusts allowed in New York for the collection and application of rents and profits of land for the use of any person were limited to his life or a shorter term, inasmuch as the statute accorded recognition nowhere else to any other type of trust for the application of rents and profits of land; and all such trusts were expressly made inalienable by Section 103, though no spendthrift purpose was involved and though the beneficiary was in every way competent to protect himself. The result was and still is that active express trusts of land in New York cannot be employed except as spendthrift trusts. In other states under the modern cases by which such trusts have developed, the

62. 1 N. Y. REV. STAT. (1829) 728, § 55.

63. In Revisers' Notes, § 55, they say: "The object of the Revisers in this section is to allow the creation of express trusts, in those cases and in those cases only, where the purposes of the trust require that the legal estate should pass to the trustees . . . Where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift (the general objects of trusts of this description) the utility of vesting the title and possession in the trustees, is sufficiently apparent."

testator or donor must express his intent that the beneficiary shall not have the power to convey and that his interest shall not be subject to his debts, or else such intent must be inferred from the facts.⁶⁴ In New York, on the contrary, not only is any such proof unnecessary, but every express trust to collect and apply rents and profits is made by statute a spendthrift trust so that the beneficiary cannot convey his interest nor can it be reached in its entirety by his creditors though the testator or donor expressly provided that it might be conveyed and should be subject to his debts.⁶⁵ The extraordinary character of this change from the settled law of generations based on public policy, a change by which testators and other donors of trust interests were not only permitted but required to suspend alienation of vested trust interests and make them inapplicable to the payment of debts, has certainly not been appreciated by the New York bar, who seem to take the law as they find it without much criticism or analysis.⁶⁶ That creditors of the beneficiary cannot reach his interest, except as statutes permit them to reach it in part, follows from its inalienability.⁶⁷ Trusts not expressly included under the statutes above discussed may be freely assigned by the beneficiary.⁶⁸ In 1897 these provisions applying to trusts in land were extended to similar trusts in personal property.⁶⁹ Long before this date,

64. See cases cited notes 42-44, *supra*. For cases in which such intent was inferred from the facts though not expressly stated see 2 POWELL, *op. cit. supra* note 7, at 854, n. 13; 855, n. 14; 856-859.

65. That the beneficiary cannot in any way, either directly or by estoppel, transfer his interest is settled law. *Tiers v. Tiers*, 98 N. Y. 568 (1885); *Matter of Wentworth*, 230 N. Y. 176, 129 N. E. 646 (1920) (no transfer by estoppel); *Central Trust Co. v. Gaffney*, 157 App. Div. 501, 142 N. Y. Supp. 902 (1st Dep't 1913) *aff'd*, 215 N. Y. 740, 109 N. E. 1079. That an express power to transfer his interest is void as against the prohibition of the statute see *Farmer's Loan & Trust Co. v. Kip*, 192 N. Y. 266, 85 N. E. 59 (1908).

66. For a further discussion of this development in the New York law see WALSH, *op. cit. supra* note 3, at 142-146.

67. REAL PROP. LAW (1909) § 98 allows surplus income to be reached over what is needed to maintain the beneficiary according to his station in life. See *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363 (2d. Dep't 1896); *Schuler v. Post*, 18 App. Div. 374, 46 N. Y. Supp. 18 (2d Dep't 1897); *Williams v. Thorn*, 70 N. Y. 270 (1877); *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169 (1896) (alimony). If the beneficiary created the trust for his own benefit it may be reached by his creditors and assigned by him. *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967 (1898) and other cases cited, WALSH, *op. cit. supra* note 3, at 147 n. See also N. Y. CIV. PRAC. ACT (1928) § 684, providing for execution against income from trusts, wages, etc., not to exceed 10% thereof. See *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001 (1911).

68. The beneficiary may alienate (1) legacies in fixed amounts under a trust, *Matter of Trumble*, 199 N. Y. 454, 92 N. E. 1073 (1910) (payment in installments but not out of income); (2) annuities payable out of both principal and income, *Clark v. Clark*, 147 N. Y. 639, 42 N. E. 275 (1895) and other cases cited WALSH, *op. cit. supra* note 3, at 147.

69. N. Y. PERS. PROP. LAW OF 1897, § 3, now PERS. PROP. LAW (1909) § 15.

in a gradual way, the courts had extended the Real Property Law's prohibition against alienation to trusts in personal property in order to make the law uniform as to trusts in both realty and personalty, a clear case of judicial legislation.⁷⁰

Rule Against Suspension of Alienation by Present Vested Trusts

The same objections which apply to excessive suspension of the absolute power of alienation in the case of future estates are equally applicable in the case of present vested trusts. Nevertheless, the New York statutes in their present form contain no provision limiting suspension of the power of alienation caused by the latter to two lives or any other period. Section 42 of the Real Property Law provides simply that "every *future* estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition whatever" for the period therein provided. Present trusts are not future estates, and there is no other statute limiting the period of such trusts in land.

In 1835 the Court of Errors held in *Coster v. Lorillard* that a trust for twelve nephews and nieces until the death of the survivor was void.⁷¹ The provisions now in Section 42 of the Real Property Law were then contained in Sections 14, 15 and 16 of the Revised Statutes, with some important differences. Section 14 contained the present provision that every future estate is void in its creation which unduly suspends the power of alienation, in no way applying to present trusts for twelve persons. Section 15 provided: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period," etc. This section would be entirely superfluous if it were construed as applying to future estates only, as Section 14 covered that ground completely. The language of Section 15 naturally includes limitations of present as well as future estates, though the word "condition" in that section creates some ambiguity, suggesting a future estate.⁷² The practical need of preventing suspension of alienation by trusts for many lives, if the purpose of the revisers was to be accomplished, made certain that this section would be interpreted, as it was, settling the law ever since, that any present estate as well as any future estate suspending the power of alienation beyond the permitted period is void. Nevertheless the present language of Section 42, resulting from the combination

70. This was finally completed in *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971 (1894). See Whiteside, *Suspension of Alienation in New York* (1928) 13 CORN. L. Q. 167, 178-181.

71. *Coster v. Lorillard*, 14 Wend. 265 (N. Y. 1835).

72. Professor Whiteside argues that this clause should have been construed as applying only to future interests. (1928) 13 CORN. L. Q. 167, 172-175.

of Sections 14, 15 and 16 of the Revised Statutes cannot possibly be so construed. There is, of course, no danger that the law on this point will be departed from because of this mistake in redrafting those sections of the Revised Statutes into Section 42. Nevertheless the error should be corrected.

It has already been pointed out that the period of suspension permitted to trusts is two lives only, the minority additional period not applying, another accidental result of statutory draftsmanship.⁷³

It should be understood that the rule against perpetuities applies only to future contingent estates, legal or equitable, and therefore future contingent trust estates are governed by it exactly as are similar legal estates. The ruling in *Coster v. Lorillard*, discussed above, creates an entirely new rule applying to present and vested future trusts, limiting their duration instead of limiting the time within which they must vest.⁷⁴

Should the New York Law of Indestructible Trusts be Modified?

The question whether the law of indestructible trusts should be altered is the crux of the problem of perpetuities in New York. If this problem were solved, there would no longer be any reason for clinging to the arbitrary and unreasonable two-lives period of the New York rule. The Findings of the Commission,⁷⁵ discussed in the first part of this article, make clear that the dangerous character of these trusts is the controlling reason for the refusal to recommend any change which would materially extend the period allowed them. While the change from two lives to multiple lives would probably not extend the period very materially, the flat twenty-one year period cannot be allowed if these trusts are to be permitted to continue without modification as at present. But if these trusts are dangerous we should courageously attack the problem, find out what is the matter with them, remove what we find to be dangerous to the public interest, and no longer permit trusts to interfere with a simple, workable rule against perpetuities instead of tolerating the present jumble of statutory mistakes.

There is probably no one in New York today, in view of our history and practice, who would question the wisdom and good policy of allowing true spendthrift trusts for the benefit of widows, minor children, older children or others of mature age including aged parents, spinster sisters or other beneficiaries of a will who in actual fact may fairly need protection against themselves because of improvidence, lack of business experience, lack of capacity for affairs, or for any other good reason.

73. See note 36, *supra*, and accompanying paragraph of the text.

74. See WALSH, *op. cit. supra* note 3, at 148-149.

75. *Supra* note 1.

Making every express trust to collect and apply income a spendthrift trust of this type though no reason therefor exists in any special case seems to be completely without reason or valid purpose,—so much so as to indicate that it was a result accidentally arrived at in the amendment of what is now Section 96 of the Real Property Law, as explained above.⁷⁶ This was directly opposed to the purpose of the revisers as disclosed by their notes.⁷⁷ The recognition in other states, by comparatively recent cases, of these trusts when expressly created as such can be justified only where they are true spendthrift trusts, where a reasonable basis exists in fact for protecting the beneficiary against his own recklessness, improvidence or ignorance of affairs.

The dangers in permitting these trusts to continue without some reasonable limitation to true spendthrift purposes have been made very clear by the Findings of the Commission heretofore quoted⁷⁸ and the other authorities hereinbefore referred to and discussed.⁷⁹ A solution suggested by Mr. Jessup in his open letter to the New York Times, and discussed in the Findings of the Commission,⁸⁰ that trusts in favor of children be allowed to continue only until they attain the age of thirty is of particular interest.

The difficulty is to devise some practicable and workable rule by which true spendthrift trusts may be given effect and spurious spendthrift trusts, which attempt to defeat the law of centuries based on the public interest by using the trust form and dragging the red herring of the "testator's intent" across their trail, may be declared void in so far as they restrict alienation and liability of the property for debts. Limiting trusts in favor of children to the age of thirty would not solve the problem in cases in which good reason would exist to protect the beneficiary beyond that age. Usually the simpler and more direct a provision may be to accomplish any desired purpose the better it will operate. A statute amending Section 103 of the Real Property Law so as to permit the creation of spendthrift trusts when substantial reasons exist for protecting the beneficiary, and providing that such reasons will be presumed to exist in all cases in which the spendthrift provisions are expressly created, but that the spendthrift provisions shall be declared void by the Surrogate in a proceeding brought for that purpose by the beneficiary or his creditors in the event that the Surrogate is satisfied that no reasonable basis existed or continues to exist for their contin-

76. See notes 62-64, *supra*, and text to which they refer.

77. See note 63, *supra*, quotation from Revisers' Notes.

78. See note 35, *supra*.

79. See notes 47-51, *supra*, and text to which they refer.

80. See note 35, *supra*, particularly the latter part of the quotation.

uance, might meet the situation. The drafting of a statute which would express this change in simple form should be an easy matter. It would make good by presumption the testamentary purpose affirmatively expressed of making the trust indestructible and free from liability for debts, except as provided to the contrary by statutes making such trusts liable for debts in part. It would leave the elimination of spurious spendthrift provisions for which no valid reason exists and which are therefore clearly contrary to public policy, to the sound discretion of the Surrogate.

No general public demand exists for any change in the present law, either of perpetuities or of indestructible trusts. No general demand exists among lawyers for these changes. The hearing before the Commission demonstrated how difficult it is for the practicing lawyer to see beyond the requirements of the cases in which he is engaged. The memorandum submitted by an attorney who apparently speaks for banks and trust companies expresses quite clearly the general attitude of lawyers,⁸¹ a kind of amazement that any question should be made of modifying the present law of indestructible trusts. It is clear that he has in mind primarily true spendthrift trusts with regard to which all are agreed. No one seems to have thought of the dangers of these trusts where no reasonable spendthrift purpose exists except Surrogate Foley, who probably wrote the Findings of the Commission from which I have quoted, Mr. Jessup and a few others.

This must be remembered: The period allowed for indestructible trusts should correspond exactly with the period within which future estates must vest. The practice of giving the property in trust until final distribution in fee to persons to be ascertained in the future has become common. The difference in the present rule applying to trusts which excludes the minority period, and the rule applying to the vesting of future estates, which includes that period, probably accidental in the drafting of the statutes, has caused much difficulty.

It should be sufficiently clear to all that the New York statutes relating to perpetuities and indestructible trusts need a thorough revision. Let us hope that the usual patchwork attempts to get some or any relief will be discontinued, and that a genuine and complete job will be done.

81. FOURTH SUPP. REP., *supra* note 1, at 291-292 (Memorandum of Mr. Edwin W. Cooney).